Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

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RAY O. HERNANDEZ,
Petitioner

v.

THE TEXAS STATE BOARD OF DENTAL EXAMINERS, C. THOMAS CAMP, AND MICHAEL PITCOCK
Respondents

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RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

May a 42 U.S.C. §1983 complaint brought against individual government officials be dismissed under Fed.R.Civ.P. 12(b)(6) for failure to comply with a fact specific pleading requirement, or is such a dismissal prohibited by either Fed.R.Civ.P. 8 or by this Court's holding in *Leatherman?*

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CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following constitutional and statutory provisions are at issue: U.S. Const. Amend. V and XIV, 42 U.S.C. §1983, and 28 U.S.C. §2072(b).

STATEMENT OF THE CASE

On June 8, 1992 Petitioner filed his original complaint in the United States District Court for the Northern District of Texas, San Angelo Division pursuant to 42 U.S.C. §1983, seeking damages for the alleged deprivation of numerous constitutional rights. The alleged basis for Petitioner's constitutional claims arose out of an arrest and subsequent dismissal of criminal charges for practicing dentistry without a license, and the prosecution of a civil contempt action, also for practicing dentistry without a license. Petitioner named the Texas State Board of Dental Examiners (TSBDE), C. Thomas Camp, Executive Director of TSBDE, and Michael

Pitcock, Director of Enforcement of TSBDE, as defendants. Petitioner sued Camp and Pitcock in both their official and individual capacities.

On August 14, 1992, the District Court dismissed both Camp and Pitcock in their official capacities, and the TSBDE, holding that Petitioner had failed to state a valid claim because neither the state nor its agencies or officials were "persons" under §1983. With respect to Camp and Pitcock in their individual capacities, the District Court ordered Petitioner to plead specific facts which, if proved, would overcome Respondents' defense of qualified immunity. Petitioner filed his First Amended Complaint on August 31, 1992. The District Court held that Petitioner had not sufficiently plead specific facts which, if proved, would overcome Respondents' defense of qualified immunity. On October 26, 1992, in an effort to allow Petitioner every opportunity to state a claim upon which relief could be granted, Petitioner was once again ordered to amend his complaint to set forth particular facts which, if proved, would constitute violations of clearly established law of which a reasonable person would have known. Further, the District Court directed Petitioner to six specific areas in which he was to set forth specific facts to overcome Respondents' claim of qualified immunity. Petitioner filed his Second Amended Complaint on November 16, 1992. On March 11, 1993, the District Court found that Petitioner had "once again, [] failed to allege sufficient facts to overcome [Respondents]' claim of qualified immunity. [Petitioner]'s allegations are mere conclusions and beliefs and no specific facts are alleged to overcome the qualified immunity defense and support a judgment." After having given Petitioner two opportunities to amend his complaint to state a claim upon which relief could be granted, the District Court dismissed Petitioner's claims against Camp and Pitcock in their individual capacities with prejudice, and rendered final judgment in favor of Respondents.

On July 8, 1994, the United States Court of Appeals for the Fifth Circuit affirmed the District Court's dismissal. Petitioner's subsequent Petition for Rehearing to the Fifth Circuit was denied on July 28, 1994.

REASONS FOR DENYING THE WRIT

ARGUMENT AND AUTHORITY

I. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE SUBSTANTIVE DEFENSE OF QUALIFIED IMMUNITY REQUIRES FACT SPECIFIC PLEADING IN ACCORDANCE WITH THE RULES ENABLING ACT, 28 U.S.C. §2072(b).

The question presented to this Court centers around the Fifth Circuit requirement of fact specific pleading when a 42 U.S.C. §1983 action is brought against government officials who are entitled to raise the substantive defense of qualified immunity. *Elliott v. Perez*, 751 F.2d 1472 (5th Cir. 1985). Petitioner claims that the fact specific[1], or "heightened pleading," requirement amends Rule 8 of the FEDERAL RULES OF CIVIL PROCEDURE. Although inherent tension exists between Rule 8 and the fact specific pleading requirement, the latter requirement for suits against individuals enjoying qualified immunity neither amends nor violates the FEDERAL RULES OF CIVIL PROCEDURE. Rule 8(a)(2) states that a pleading shall contain a short and plain

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[1] The Respondents use the term "fact specific pleading requirement" rather than "heightened pleading standard" because the former is more specific than the latter, which appears also to encompass the direct evidence pleading requirement of the D.C. Circuit, *see Siegert v. Gilley*, 500 U.S. 226, 229-33, 111 S. Ct. 1789, 1792-93 (1991); *id.* at 1795 (Kennedy, J., concurring), and the heightened production summary judgment requirement common to many circuits, *see, e.g., Kimberlin v. Quinlan*, 6 F.3d 789, 794 n.8 (D.C. Cir. 1993), *petition for cert. filed*, 63 U.S.L.W. 3009 (U.S. June 22, 1994) (No. 93-2068).

statement of the claim *showing that the pleader is entitled to relief.* In a §1983 complaint against an individual government official, a plaintiff fails to show entitlement to relief if he does not both state a violation of a constitutional right, and overcome the individual defendant's qualified immunity. Such an interpretation does not expand or amend Rule 8, but merely applies the language of the rule literally.

In a §1983 cause of action where a defendant is entitled to raise the qualified immunity defense, the defendant official's conduct must be shown to have violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald,* 457 U.S. 800, 818, 102 S.Ct. 2727, 2738 (1982); *Anderson v. Creighton*, 483 U.S. 635, 646 n.6, 107 S.Ct. 3034, 3042 n.6 (1987). A government official's liability generally turns on the "objective reasonableness" of the action assessed in light of the legal rules that were "clearly established" at the time it was taken. *Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038-39. The law must have been sufficiently clear so as to put the government official on notice that his actions were improper. *Id.* This is a threshold issue that must be resolved at the earliest possible stage in the litigation process. *Hunter v. Bryant*, 502 U.S. 224, 112 S.Ct. 534, 536 (1991); *citing Harlow*, 457 U.S. at 818; 102 S.Ct. at 2738; *Davis v. Scherer*, 468 U.S. 183, 195, 104 S.Ct. 3012, 3019 (1984); *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S.Ct. 2806, 2815 (1985); *Malley v. Briggs,* 475 U.S. 335, 341, 106 S.Ct. 1092, 1096 (1986); *Anderson*, 483 U.S. at 646 n.6, 107 S.Ct. at 3042 n.6. Since Rule 8 requires a pleader to show in his complaint that he is entitled to relief, the determination of this issue is most appropriate at the pleading stage.

Petitioner states that it is noteworthy that Respondents neither filed a Motion for Summary Judgment, nor sought any discovery in this case. Although the *Harlow* court suggested that the qualified immunity analysis take place on a motion for summary judgment, at the same time it *prohibited discovery* until the immunity question is resolved. *See Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815 ("[u]nless the plaintiff's allegations state a claim of violation of a clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery"). *See also Anderson*, 483 U.S. at 646 n.6, 107 S.Ct. at 3042 n.6 (confirms no discovery unless plaintiff's well-pleaded complaint contains disputed material allegations; then *if necessary*, it is limited to the issue of immunity) (emphasis added). Without the factual development through discovery presupposed by the concept of notice pleading, the more appropriate procedural mechanism for qualified immunity determinations is Rule 12(b)(6), not Rule 56. If a defendant wished to attach evidence outside the pleadings, such as an affidavit, the court could treat the motion to dismiss alternatively as a motion for summary judgment pursuant to Rule 12(c). *See* Comment, *Qualified Immunity for Government Officials: The Problem of Unconstitutional Purpose in Civil Rights Litigation*, 95 YALE L.J. 126, 144-45 n.72 and n.73 (1985). The court also has the option of requiring a more definite statement from the plaintiff. *See Siegert*, 500 U.S. at 235-36, 111 S.Ct. at 1795 (plaintiff must plead fact specific allegations once the qualified immunity defense has been asserted) (Kennedy, J., concurring). Since qualified immunity is a threshold issue, and discovery is prohibited until this issue is resolved, a 12(b)(6) motion to dismiss is the most appropriate and effective procedural device to dispose of a §1983 cause of actionable to overcome qualified immunity. In a §1983 case where a plaintiff, such as Petitioner, cannot overcome qualified immunity, he has effectively failed to state a claim showing that the he is entitled to relief, and the case should be disposed at the

earliest possible stage of litigation. Rule 12(b)(6) provides the most expedient and least disruptive means to accomplish this end.

If conclusory allegations could suffice to state a constitutional violation, the protections afforded by the immunity defense would be abrogated in the very manner *Harlow* and *Anderson* sought to avoid. A court must determine whether a plaintiff has asserted a violation of any constitutional right; if such an assertion is made, it must address whether that right is "clearly established" under the facts and circumstances of the case. *Siegert*, 500 U.S. at 232, 111 S.Ct. at 1793. Thus, in order to effectuate the substantive defense of qualified immunity, the factual elements of plaintiff's claim must appear on the face of his complaint with enough particularity that the judge may determine whether the action should go forward. To ensure that the substantive protection afforded by qualified immunity is not abrogated, the fact specific pleading requirement is fundamentally necessary.

The primary purpose of the fact specific pleading requirement is to allow judges to ascertain whether the action should go forward in the face of the substantive defense of qualified immunity. *Elliott*, 751 F.2d at 1480. The requirement is for the plaintiff to "state with factual detail and particularity the basis for the claim which necessarily includes why the defendant-official cannot successfully maintain the defense of immunity." *Id.* at 1473. To overcome the immunity defense, plaintiffs must plead specific facts sufficient to place reasonable officials on notice that their actions were improper.[2] *Streetman v.*

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[2] Plaintiffs can plead sufficient facts through any number of procedures. The most obvious is pleading facts in the federal complaint or state petition. Likewise amendments, to be freely permitted under Rule 15(a), will suffice. Courts may also use a more definite statement under Federal Rule of Civil Procedure 12(e), a questionnaire approved by the Fifth Circuit in *Watson v. Ault*, 525 F.2d 886 (5th Cir. 1976), or the

Jordan, 918 F.2d 555, 556 (5th Cir. 1990) (requiring qualified immunity to be resolved on the face of the pleadings if possible); *see Hunter*, 502 U.S. at 224, 112 S. Ct. at 536 (requiring qualified immunity to be resolved as early as possible in litigation); *see also Barts v. Joyner*, 865 F.2d 1187, 1194 (11th Cir. 1989) ("*Harlow* [*v. Fitzgerald*]'s clearly established standard demands that a bright line be crossed. The line is not to be found in abstractions—to act reasonably, to act with probable cause, and so forth—but in studying how these abstractions have been applied in concrete circumstances."). A court can then compare the facts the plaintiff pleads with the clearly established law the plaintiff pleads the officials violated. *Anderson*, 483 U.S at 646 n.6, 107 S.Ct. at 3042 n.6 (requiring the district court, on remand, to determine whether a reasonable officer could have believed the actions alleged were lawful); *Mitchell*, 472 U.S. at 528 n.9, 105 S.Ct. at 2816 (noting that the immediately appealable issue is whether the pleaded facts support a claim of violation of clearly established law). The reason that bare, legal, broad, and conclusory allegations are unacceptable is that they are not susceptible to proof or disproof such that reasonable officials could understand that what they are doing violates constitutional rights. *See Anderson*, 483 U.S. at 638, 641, 107 S.Ct. at 3038; *Hopkins v. Stice*, 916 F.2d 1029, 1030-31 (5th Cir. 1990) (holding officers are immune if "a reasonable official would be left uncertain of the application of the standard to the facts confronting him").

The substantive defense of qualified immunity prohibits plaintiffs from exposing officials to the burdens associated with litigation. *Mitchell*, 472 U.S at 526, 105 S.Ct. at 2815; *Harlow*, 457 U.S. at 813, 107 S.Ct. at 2735 (listing "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens

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record of a hearing approved by the Fifth Circuit in *Spears v. McCotter*, 766 F.2d 179 (5th Cir. 1985). *See Elliott*, 751 F.2d at 1482.

from acceptance of public office"). Without factually specific pleadings, the only method available for officials to prove their entitlement to immunity is engaging in discovery to determine the factual basis of plaintiffs' complaints, then moving for summary judgment on the defense of qualified immunity. If notice pleadings are sufficient to permit plaintiffs to engage in discovery on the issue of immunity, and thereby require defendants to respond with discovery in order to affirmatively prove their immunity defense, the substantive protection afforded by immunity has been breached by exposing officials to the burdens associated with litigation.[3] Permitting such vague pleadings would reduce *Harlow* to a rule of pleading. *See Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038-39; *see also Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815 ("Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before the commencement of discovery.").

Petitioner contends that the Fifth Circuit is prohibited from enforcing its fact specific pleading requirement absent an amendment of the FEDERAL RULES OF CIVIL PROCEDURE. This is not the case. The Rules Enabling Act permits the Supreme Court to prescribe general rules for the federal courts, with the limitation that "[s]uch rules may not abridge, enlarge or modify any substantive right." 28 U.S.C. §2072(b). Because immune officials have a substantive right

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[3] Although qualified immunity from suit entitles officials to immunity from discovery irrelevant to the issue of qualified immunity until they have had an opportunity to present a motion for summary judgment on the issue, this protection is limited in value because the defense of qualified immunity operates on every issue necessary to establish liability. This is particularly true where the issue of intent is part of the cause of action (as, for example, in virtually every prisoner's Eighth Amendment claim). As this Court noted in rejecting the subjective motivation test for qualified immunity, "[j]udicial inquiry into subjective motivation . . . may entail broad ranging discovery and the deposing of numerous persons . . . ." *Harlow*, 457 U.S. at 817, 102 S.Ct. at 2737.

to be free from the burdens associated with litigation, Rule 8 would violate the Rules Enabling Act if it applied to cases involving qualified immunity. *See Elliott*, 751 F.2d at 1479. Notice pleading strips immune officials of their substantive freedom from the burdens of litigation. *Id.* This Court suggested as much by distinguishing its *Leatherman* decision from cases involving qualified immunity because "municipalities do not enjoy immunity from suit." *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. at ___, 113 S. Ct. at 1162; *see also Jordan v. Jackson*, 15 F.3d 333, 340 n.5 (4th Cir. 1994) (noting that *Leatherman* "seemed almost to suggest [the question of the fact specific pleading requirement in qualified immunity cases] might be answered in the affirmative").

The inherent tension between the fact specific pleading requirement and Rule 8 does not amount to an amendment of said procedural rule.[4] As the Fifth Circuit stated in *Elliott*:

> The public goals sought by official immunity are not procedural. Indeed they go to very fundamental substantive objectives. To the extent that F.R.Civ.P. 8 and the practices under it present any conflict, the trial court must find a way to adapt its procedures to assure full effectuation of this substantive right, since the Enabling Act provides that the rules shall not abridge, enlarge or modify any substantive right.

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[4] In fact, every circuit has found occasion to require at least a minimum of factual specificity when pleading a civil rights complaint. *See Hobson v. Wilson*, 737 F.2d 1, 30 n.87 (D.C. Cir. 1984), *cert. denied sub nom. Brennen v. Hobson*, 470 U.S. 1084, 105 S.Ct. 1843 (1985) (listing cases).

Elliott, 751 F.2d at 1479. A member of this Court has also recognized this tension:

> The heightened pleading standard is a departure from the usual pleading requirements of Federal Rules of Civil Procedure 8 and 9(b), and departs also from the normal standard for summary judgment under Rule 56. But avoidance of disruptive discovery is one of the very purposes for the official immunity doctrine, and it is no answer to say that the plaintiff has not yet had the opportunity to engage in discovery. The substantive defense of immunity controls.

Siegert, 500 U.S. at 235, 111 S.Ct. at 1795 (Kennedy, J., concurring). Because "the substantive defense of immunity controls," the fact specific pleading standard is a judicial solution to effectuate the immunity defense in a civil rights claim. As Judge Higginbothom, concurring, stated in *Elliott*:

> We must solve judicial problems, and we must not solve legislative problems. My effort has been to demonstrate that it is a judicial problem--defining the content of immunity--that we face here.

751 F.2d at 1483. The fact specific pleading requirement is not a substantive right itself, nor is it a judicial amendment to the FEDERAL RULES OF CIVIL PROCEDURE. Rather, it is a mechanism which allows the immunity defense to be realized, in accordance with the formative principles of the Rules Enabling Act, 28 U.S.C. §2072(b). It is not a technical rule which exists independently from the substantive right with which it is associated. Fact specific pleading assists the district court in no less an objective than "avoid[ing] excessive disruption of government and permit[ting] the

resolution of [] insubstantial claims." *Harlow*, 457 U.S. at 818, 102 S.Ct. at 2738.

II. THIS COURT SHOULD DENY CERTIORARI BECAUSE THIS COURT'S HOLDING IN LEATHERMAN DOES NOT APPLY TO INDIVIDUAL DEFENDANTS WHO ENJOY QUALIFIED IMMUNITY

Petitioner asserts that the Fifth Circuit's "heightened pleading standards" were struck down by this Court in *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, ___ U.S. ___, 113 S.Ct. 1160 (1993). This assertion is both deceptively true and patently false. This Court in *Leatherman* specifically resolved a conflict among the Courts of Appeals concerning the applicability of a heightened pleading standard to §1983 actions alleging *municipal liability*. *Id.* at ___, 113 S.Ct. at 1161. This Court expressly stated that it "h[ad] no occasion to consider whether our qualified immunity jurisprudence would require a heightened pleading in cases involving government officials." *Id.* at ___, 113 S.Ct. at 1162. Since the substantive defense of qualified immunity was not involved in the determination of whether specific pleading requirements are necessary when a municipality is a defendant, this Court's decision in *Leatherman* is distinguishable, and, contrary to Petitioner's assertion, did not strike down the 5th Circuit's specific pleading requirement as to individual government officials.

This Court pointed out the very distinction between municipalities and individual officials that render *Leatherman* inapplicable in a case involving the substantive defense of qualified immunity. Municipalities are not afforded qualified immunity based upon the objective good faith of their agents, as are individual government officials. *Id.* at ___, 113 S.Ct. at 1162; *Owen v. City of Independence*, 445 U.S. 622, 650, 100 S.Ct. 1398, 1415 (1980). Although

municipalities may be immune from *liability* in certain situations,[5] they do not have immunity from suit as do individual officials. *Leatherman*, ___ U.S. at ___, 113 S.Ct. at 1162. When the substantive defense of qualified immunity is not involved, the factual elements of a plaintiff's claim in such a case need not appear on the face of his complaint with enough particularity that the judge may determine whether the action should go forward. *Leatherman*, ___ U.S. at ___, 113 S.Ct. at 1162. The issue of municipal liability, therefore, is not a threshold issue that must be resolved at the earliest possible stage in the litigation process, as is the issue of qualified immunity for individual officials.

Further, there was no underlying substantive right involved in *Leatherman* as in this case. As stated above, the Rules Enabling Act permits the Supreme Court to prescribe general rules for the federal courts, with the limitation that "[s]uch rules may not abridge, enlarge or modify *any substantive right.*" 28 U.S.C. §2072(b)(emphasis added). Because immune officials have the substantive right to be free from the burdens associated with litigation, this case is clearly distinguishable from *Leatherman*. *See Elliott*, 751 F.2d at 1479. *Leatherman* did not involve the substantive right to be immune from suit, and therefore the conflict between the fact specific requirement for §1983 *municipal* defendants and Rule 8 was not governed by the Rules Enabling Act, as is the conflict involving individual officials enjoying qualified immunity.

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[5] "A municipality cannot be held liable under §1983 on a *respondeat superior* theory." *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 691, 98 S.Ct. 2018, 2036.

Petitioner contends that the *Leatherman* case should cover all §1983 defendants. In support of this contention, Petitioner cites to a district court order that held that the heightened pleading standard does not apply to CERCLA[6] cases. *Warwick Administrative Group v. Avon Products, Inc.*, 820 F.Supp. 116, 121 (S.D.N.Y. 1993). In addition to the fact that the cited case does not involve a civil rights complaint, the question of qualified immunity was not involved in *Warwick*. Both *Leatherman* or *Warwick* are distinguishable in that the fact specific pleading requirements implemented were not necessary to allow judges to ascertain whether a §1983 action should go forward in the face of qualified immunity. The public goals inherent in the substantive defense of qualified immunity were not at issue in either of these cases, and Petitioner's reliance on them for that purpose is misplaced.

III. THIS COURT SHOULD DENY CERTIORARI BECAUSE THE FACT SPECIFIC PLEADING REQUIREMENT SERVES THE RULE OF LAW.

The Fifth Circuit has articulated that reducing the burdens associated with litigation is the policy underlying the fact specific pleading requirement. Typically cited as specific costs are those enumerated in *Anderson* and *Harlow*: "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038; *Harlow*, 457 U.S. at 814, 102 S.Ct. at 2736. By themselves these considerations fail to explain why qualified immunity should not be available to private persons. *See Wyatt v. Cole*, ___ U.S. ___, 112 S. Ct. 1827, 1833 (1992). Private persons desire to avoid these consequences just as much as government officials do. Distinguishing government officials simply because they

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[6] The Comprehensive Environmental Response, Compensation, and Liability Act of 1980, 42 U.S.C.A. §§9601 et seq.

work for the public and not because of some related policy unique to government is circular. Thus, because the typically cited policy appears to apply with equal force to private defendants, it does not explain why only government officials have qualified immunity.

The policy that distinguishes between public and private defendants is that, without qualified immunity, government officials will be tempted to avoid the burdens associated with litigation *by applying the law preferentially* in favor of those who seem most likely to sue. Preferential application of the law violates the rule of law, a concept that applies peculiarly to government officials. *See* Black's Law Dictionary 1332 (6th ed. 1990) ("[D]ecisions should be made by the application of known principles or laws without the intervention of discretion in their application"); Friedrich A. Hayek, *The Constitution of Liberty* 209-10 (1960) ("The ideal of the rule of law requires that the state either enforce the law upon others—and that be its only monopoly—or act under the same law and therefore be limited in the same manner as any private person.") This Court has indirectly adopted this policy in its qualified immunity jurisprudence. In *Harlow*, this Court noted one of the policies supporting qualified immunity is the "inhibition of discretionary action." *Harlow*, 457 U.S. at 816, 102 S.Ct. at 2737, *cited by Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815. This policy protects "action taken with independence and without fear of the consequences." *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2738 (internal quotations marks omitted), *cited by Mitchell*, 472 U.S. at 525, 105 S.Ct. at 2815. Likewise, *Anderson* noted "the risk that fear of personal monetary liability and harassing litigation will unduly inhibit officials in the discharge of their duties." *Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038; *accord Harlow*, 457 U.S. at 814, 102 S.Ct. at 2736 (finding that "the danger of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties" (alterations in original)) (quoting *Gregoire v.*

Biddle, 177 F.2d 579, 581 (2d Cir. 1949) (Hand, J.), *cert. denied*, 339 U.S. 949, 70 S.Ct. 803 (1950). This Court best recognized the link between the fact specific pleading requirement and the effective performance of public duties in *Davis v. Scherer*: "The qualified immunity doctrine recognizes that *officials can act without fear of harassing litigation* only if they reasonably can anticipate when their consequences may give rise to liability for damages and *only if unjustified lawsuits are quickly terminated.*" 468 U.S. at 195, 104 S.Ct. at 3019 (emphasis added), *cited by Anderson*, 483 U.S. at 639, 107 S.Ct. at 3038.

This Court has recently made more explicit the connection between officials' fear of harassing lawsuits and the rule of law. In *Wyatt v. Cole*, this Court held that private persons sued in civil rights actions are not entitled to qualified immunity because "extending *Harlow* qualified immunity to private parties would have no bearing on whether public officials are able to act forcefully and decisively in their jobs." *Wyatt*, ___ U.S. at ___, 112 S. Ct. at 1833-34. *Wyatt* made the connection to the rule of law by citing virtually overruled case law for the policy that survived the cases: "denial of qualified immunity . . . would contribute not to principled and fearless decision-making but to intimidation." *Id.* at ___, 112 S.Ct. at 1833 (internal quotation marks omitted) (quoting *Woods v. Strickland*, 420 U.S. 308, 319, 95 S.Ct. 992, 999 (1975); quoting *Pierson v. Ray*, 386 U.S. 547, 554, 87 S.Ct. 1213, 1218 (1967), *comprehensively reformulated by Harlow*, 457 U.S. at 814-19, 102 S.Ct. at 2735-39). The intimidation that concerned this Court in *Woods* and *Pierson* is the danger that officials will seek to avoid harassing litigation by preferentially applying the law to those who threaten to sue. *See Pierson*, 386 U.S. at 554, 386 S.Ct. at 1218; *accord Elliott*, 751 F.2d at 1478. Greasing only the squeaking wheel violates the rule of law, the fundament of American jurisprudence.

This justification not only distinguishes between governmental and private defendants, but also demonstrates that immunity from the burdens associated with litigation is the substance of qualified immunity. Litigation that places any burden upon officials gives them an incentive to avoid the burden by giving the people most likely to sue whatever they want. To prevent this unequal application of the law, the doctrine of qualified immunity must protect officials from the burdens associated with litigation, as listed by *Harlow*: "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow*, 457 U.S. at 814, 102 S.Ct. at 2736, *quoted by Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038.

This policy justifies protection only until reasonable officials would know that their actions are unlawful; any further extension would itself violate the rule of law by permitting government officials to violate the law with impunity. *Harlow*, 457 U.S. at 819, 102 S.Ct. at 2738 ("[W]e provide no license to lawless conduct. . . . Where an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate."); *see Mitchell*, 472 U.S. at 522-523, 105 S.Ct. at 2813 (refusing absolute immunity to high ranking executive officials because absolutely immune officials are those who "are subject to other checks that help to prevent abuses of authority from going unredressed"); *Harlow*, 457 U.S. at 809, 102 S.Ct. at 2733 (refusing to grant absolute immunity to high ranking executive officials because it would afford a "greater potential for a regime of lawless conduct"); *see also Anderson*, 483 U.S. at 638, 107 S.Ct. at 3038 (stating that an action for damages may be the only effective remedy for abuse of office); *Harlow*, 457 U.S. at 818-19, 102 S.Ct. at 2738 ("[A] reasonably competent government official should know the law governing his conduct.").

To judge whether to strip officials of their immunity, trial courts must have information which would inform reasonable officials that their actions were unlawful; requiring fact specific pleading fulfills this function. *See Elliott*, 751 F.2d at 1482. To require less would subject officials to the burdens associated with litigation and create the dangers to the rule of law that this Court's qualified immunity jurisprudence seeks to avoid.

CONCLUSION

Accordingly, Respondents respectfully request that this Court deny Petitioner's Writ of Certiorari to the United States Supreme Court.

Respectfully submitted,

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